STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2002
v	No. 233163 Oakland Circuit Court
MARIO ADAMS, Defendant-Appellant.	LC No. 00-174614-FH

Before: Meter, P.J., and Saad and Burns*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion, MCL 750.110a(2), and unlawful driving away another's motor vehicle, MCL 750.413. The trial court sentenced defendant as a fourth habitual offender to five to twenty years in prison for the home invasion conviction and one to twenty years in prison for the driving away another's vehicle conviction. We affirm.

Defendant contends that the prosecutor exerted impermissible pressure on complainant, Juanita Brown, in order to prevent her from testifying at defendant's trial. As this Court reiterated in *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999):

> When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.

The record reflects that, at defendant's preliminary examination, Brown gave a different explanation of the events leading to defendant's arrest than she gave to the police on the night of the incident. While certain aspects of Brown's statements were similar, her version of events at the preliminary examination was clearly different than what she told the police both orally and in a written statement.

Following defendant's preliminary examination, Brown decided to invoke her Fifth Amendment right against self-incrimination. At a hearing just before defendant's trial, Brown testified that during a telephone conversation, the prosecutor "threatened" to charge her for filing

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

a false police report and perjury. Because she feared prosecution, Brown stated that she decided not to testify at defendant's trial. However, during the prosecutor's redirect examination, Brown clarified that the prosecutor said that "if" Brown filed a false police report it would constitute a felony and "if" Brown took the stand and lied under oath it would constitute perjury.

The trial court correctly ruled that the prosecutor did not coerce or intimidate Brown to prevent her testimony at defendant's trial. This Court addressed a similar allegation of prosecutorial misconduct in *People v Layher*, 238 Mich App 573, 578; 607 NW2d 91 (1999):

> It is well settled that a prosecutor may not intimidate witnesses in or out of court. *People v Clark*, 172 Mich App 407, 409; 432 NW2d 726 (1988), citing *People v Pena*, 383 Mich 402, 406; 175 NW2d 767 (1970), and *People v Crabtree*, 87 Mich App 722, 725; 276 NW2d 478 (1979). *However, a prosecutor may inform a witness that false testimony could result in a perjury charge.* [Emphasis added.]

Brown specifically acknowledged that the prosecutor merely informed her "that false testimony could result in a perjury charge." *Layher, supra* at 578. No evidence suggests that the prosecutor told Brown she was under investigation or that the prosecutor made repeated threats of prosecution or punishment to intimidate or dissuade her from testifying. Rather, the prosecutor's remarks merely informed Brown of the possible consequences of testifying untruthfully. The record reveals no prosecutorial misconduct and defendant was not denied a fair and impartial trial.

Defendant contends that the prosecutor presented insufficient evidence to support his first-degree home invasion conviction.

"In determining whether sufficient evidence has been presented, [this Court] view[s] the evidence in a light most favorable to the prosecution to determine if any rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Knapp*, 244 Mich App 361, 368; 624 NW2d 227 (2001).

Defendant argues that the prosecutor failed to present evidence that he intended to hit Brown or to steal her car keys and telephones *before or during* his entry into her apartment. Contrary to defendant's argument, the home invasions statute, amended in 1999, specifically states that a person may be found guilty of home invasion if he "breaks and enters a dwelling or enters a dwelling without permission and, *at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault . . . .*" MCL 750.110a(2) (emphasis added).

This incident occurred in September 2000, long after the statute was amended to include the above language. Accordingly, the prosecutor did not need to prove that defendant had the specific intent to commit a larceny or assault before he broke down the door or as he was breaking down the door. Overwhelming evidence showed that defendant broke into Brown's apartment while Brown was lawfully inside and that, while defendant was inside, he stole Brown's car keys and punched her in the face. Indeed, defendant presented no testimony to contradict that evidence. Clearly, therefore, as the jury did here, "a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt" and defendant is not entitled to relief on this basis. *Knapp, supra* at 368.

Defendant further asserts that the trial court should have, *sua sponte*, given the jury an instruction on a misdemeanor, MCL 750.414, use of motor vehicle without authority but without intent to steal.

"A trial court must instruct the jury with respect to necessarily included lesser offenses upon a request for such instructions." *People v Reese*, 242 Mich App 626, 629; 619 NW2d 708 (2000). However, it is well-settled that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29. Moreover, a trial court has "no duty whatsoever to instruct sua sponte" on a lesser included misdemeanor offense. *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998); *Reese*, *supra*, at 630 n 2; *People v Larry*, 162 Mich App 142, 152; 412 NW2d 674 (1987). Here, defense counsel failed to request an instruction on MCL 750.414 and expressly approved the instructions as given by the trial court. *Larry*, *supra* at 152. Accordingly, the trial court did not err by failing to give the instruction and we decline to address the issue further.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns